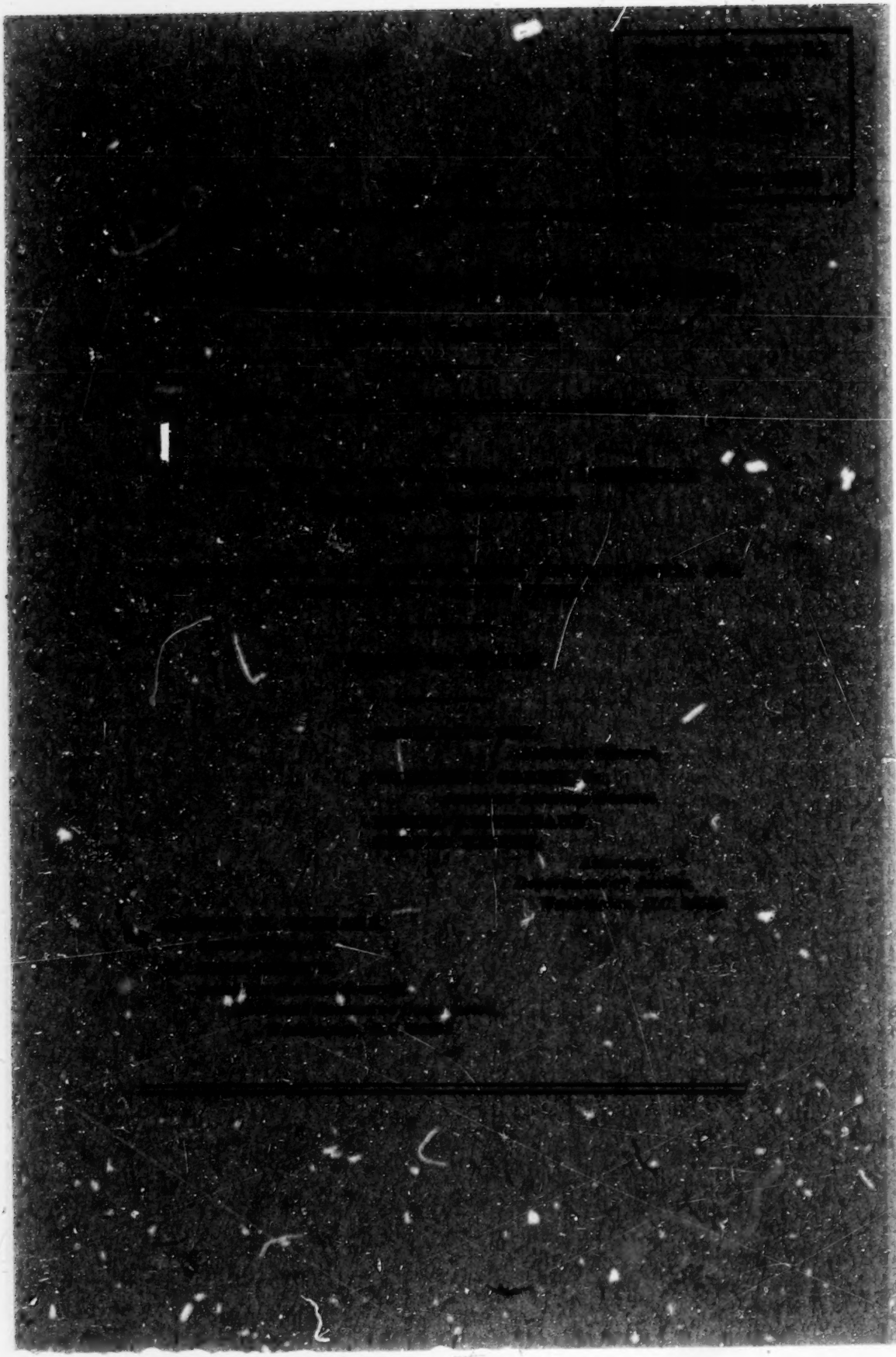

INDEX

	Page
Statement	1
Argument	5
Conclusion	10
Appendix	11

CITATIONS

Cases:

Jones Motor Co., Inc. v. *United States and Interstate Commerce Commission*, 218 F. Supp. 133 — 8, 9

Radio Corporation of America v. *United States*, 341 U.S. 412 — 6

Service Storage & Transfer Co. v. *Virginia*, 359 U.S. 171 — 4, 5, 6, 8

Universal Camera Corp. v. *National Labor Relations Board*, 340 U.S. 474 — 6

Statute:

Interstate Commerce Act, 49 U.S.C., *et seq.*:

National Transportation Policy, 49 U.S.C. preceding Section 1 — 7

Part II, 49 U.S.C. 301 *et seq* — 7

Section 202(b) (49 U.S.C. 302(b)) — 7, 8

Section 203(a)(10) (49 U.S.C. 303(a)(10)) — 7, 8

Section 203(c) (49 U.S.C. 303(c)) — 2

Section 204(c) (49 U.S.C. 304(c)) — 6, 8

Section 206(a)(1) (49 U.S.C. 306(a)(1)) — 3

715-364- 63

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 467

ARROW CARRIER CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, the United States and the Interstate Commerce Commission move that the judgment of the district court be affirmed.[1]

STATEMENT

This is a direct appeal from a final judgment, entered on June 14, 1963, by a three-judge district court convened pursuant to 28 U.S.C. 2284 and 2325. The district court refused to set aside an order of the Interstate Commerce Commission entered in *Pennsyl-*

[1] The opinion of the district court is reported at 219 F. Supp. 43.

vania Public Utility Commission v. *Hudson Transportation Company*, Docket No. MC–C–2671, 88 M.C.C. 745,[2] requiring appellant to cease holding itself out or performing, under certificates issued by the Commission, certain operations which the Commission in its accompanying report (J.S. 17a–26a) found to be essentially intrastate in character.[3] The Commission had found that these operations by appellant (J.S. 26a) "between * * * points in Pennsylvania, through points in New Jersey, which transportation of property originates and terminates within Pennsylvania, are, but for their routing, in intrastate commerce inasmuch as they are conducted as a subterfuge to evade the laws of Pennsylvania and they are not authorized by [its] certificates." The underlying facts are as follows:

On October 8, 1959, the Pennsylvania Public Utility Commission filed a complaint with the Interstate Commerce Commission (ICC) alleging that appellant was transporting property by motor vehicle between certain points in Pennsylvania over routes through points in New Jersey, without first having obtained appropriate certificates of public convenience and necessity from the ICC as required by Sections 203(c)

[2] The report of the Commission also embraces the following proceedings: No. MC–C–2696, *Pennsylvania Public Utility Commission* v. *Arrow Carrier Corporation;* No. MC–113933, *Hudson Transportation Company—Petition for Declaratory Order;* and Nos. MC–71536 and MC–71536, subnumbers 1, 2, and 3, *Arrow Carrier Corporation—Petition for Declaratory Order.*

[3] The order of the Commission also denied appellant's petition for a declaratory order finding appellant's described operations to be lawful. (J.S. 19a, 33a.)

and 206(a)(1) of the Interstate Commerce Act (49 U.S.C. 303(c) and 306(a)(1)) and without having obtained a certificate from the PUC as required by the laws of Pennsylvania. In its reply to the complaint, appellant admitted that it was transporting property which originated at points in Pennsylvania and terminated at other points in Pennsylvania by way of routes through New Jersey.[*]

At the hearing before the Commission, it was established that (1) the driving time and distance over appellant's routes through New Jersey are almost double the direct and more convenient routes within Pennsylvania (J.S. 8a); (2) that appellant handles a substantial amount of traffic which originates and terminates at points within Pennsylvania (J.S. 7a); (3) that it advertises a direct service for traffic between points in Pennsylvania and that it openly and actively solicits such traffic (83 M.C.C. at 734); (4) that it possesses no authority from the State of Pennsylvania to carry this traffic over the shorter and more convenient routes in Pennsylvania (J.S. 9a); and (5) that, in the absence of State regulation, appellant would use the shorter and more direct intrastate routes within Pennsylvania (J.S. 8a).

---

[*]The Commission, Division 1, in its report states (see Motion to Affirm by PUC 40a):

"The complaint in No. MC–C–2696 alleges, and *Arrow admits*, that from July 31, 1958, to August 23, 1958, defendant therein transported a total of 10 shipments from Scranton, Bangor, Allentown, Shamokin, Wilkes-Barre, and Swoyersville, Pa., to Philadelphia, and a total of seven shipments from the latter point to Catasauqua, Muncy, Shamokin, White Haven, and Scranton, Pa. All of the above shipments moved to some extent over routes in New Jersey. * * *" [Italics supplied.]

The hearing examiner, Division 1, and the full Commission on reconsideration, concluded that the appellant was simply using its interstate certificates as a device to convert intrastate traffic into interstate traffic, and thereby to escape regulation by the State of Pennsylvania.[5] While the Division believed that it lacked jurisdiction to restrain intrastate operations, the full Commission held that a cease-and-desist order was the proper remedy under *Service Storage & Transfer Co.* v. *Virginia,* 359 U.S. 171 (J.S. 22a–25a). The Commission stated in its Report on Reconsideration:

> We are convinced that in the absence of regulation by the Commonwealth of Pennsylvania both defendants would use the normal and direct routes between the Pennsylvania points they hold themselves out to serve. We are satisfied, as were division 1 and the examiner, that in the transportation of freight moving between Pennsylvania points without a prior or subsequent interstate movement, the defendants have attempted in bad faith to convert what is essentially intrastate commerce into interstate commerce and thus to defeat the regulatory laws and policies of the Commonwealth of Pennsylvania. In other words, this is a case of subterfuge, pure and simple [J.S. 22a].

The three-judge district court affirmed the Commission's order. It noted that the procedure followed by the Pennsylvania Public Utility Commission in filing

---

[5] Report and recommended order of the Examiner issued May 16, 1960; Report of the Commission, Division 1, November 30, 1960, 83 M.C.C. 729; and Report of the Commission on Reconsideration, March 19, 1962, 88 M.C.C. 745.

a complaint with the Interstate Commerce Commission was in accord with this Court's decision in *Service Storage & Transfer Co., Inc.* v. *Virginia,* 359 U.S. 171 (J.S. 9a–10a). The Court then went on to hold that

> From all of the evidence in [this suit] the unavoidable conclusion is that the * * * Arrow routes involved are not logical and normal operations through their headquarters; that the use by * * * Arrow of [its] tacked on routes is a deliberate, calculated method employed by [it] to avoid the unfavorable consequences to them of their intrastate Pennsylvania traffic coming within the rightful jurisdiction of the Utility Commission of that Commonwealth [J.S. 11a].

The district court concluded that it was evident that appellants had abused its certificates and that the Commission was therefore justified in issuing its cease and desist order.

ARGUMENT

This appeal presents no substantial question warranting plenary review by this Court.

1. This Court has held that the Commission has the primary responsibility to determine the scope of certificates issued by it and to decide whether particular operations of certificated carriers are in abuse of their certificates because conducted as a subterfuge in order to escape state regulation. *Service Transfer Co.* v. *Virginia,* 359 U.S. 171, 177. Where a State believes that an interstate carrier's operation "is not bona fide interstate but is merely a subterfuge to escape its jurisdiction, it can avail itself of the

remedy Congress has provided in the [Interstate Commerce] Act. Section 204(c)* * * * authorizes the filing of a 'complaint in writing to the Commission by any * * * State board * * * [that] any * * * carrier * * *' has abused its certificate." *Service Transfer Co., supra,* p. 179. The instant appeal involves such a complaint by the State of Pennsylvania. The district court concluded that (J.S. 13a), "It is strongly evident from the whole of the evidence that * * * [appellant has] abused [its] disputed certificates and that the Interstate Commerce Commission was justified in so finding and in issuing its cease and desist orders". This factual determination warrants no further review by this Court. *Radio Corporation of America* v. *United States,* 341 U.S. 412, 420; *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 490–491.

2. The appellant complains that the Commission's finding of subterfuge is unsupported by any "affirmative evidence of bad faith, such as concealment, fraud or deceit" (J.S. 10). The short answer is that such evidence is unnecessary. The test which this Court set forth for the Commission to follow in determining whether or not a carrier has "abused its certificate" is whether a carrier's operation is a "bona fide interstate" operation or "merely a subterfuge to escape [State] jurisdiction." *Service Transfer, supra,* at 179. In cases such as this one, the inference may be drawn from an examination of the transportation factors involved, *e.g.,* the use of long and inconvenient

*49 U.S.C. 304(c).

routes without any business or economic justification except to avoid regulation by an appropriate State authority.

3. Appellant contends that its proscribed operations are bona fide on their face because they are conducted under the authority of valid, subsisting certificates. Moreover, appellant emphasizes that its transportation between two points in Pennsylvania routed through New Jersey is, by statutory definition, interstate commerce. Thus, appellant relies on Section 203(a)(10) of the Interstate Commerce Act (49 U.S.C. 303(a)(10)) which states in part that, "The term 'interstate commerce' means commerce between any place in a State and any place in another State or between places in the same State through another State * * *."

There is, of course, no dispute that appellant's operations were technically in interstate commerce. The question is whether this form of interstate commerce was authorized by its certificate. Section 202 (b) of the Interstate Commerce Act (49 U.S.C. 302(b)) specifically provides that the provisions of Part II of the Interstate Commerce Act, 49 U.S.C. 301 *et seq.*, shall not be construed to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof."[1] In order to ac-

[1] In addition, Congress in the National Transportation Policy, 49 U.S.C. preceding Section 1, has admonished the Commission "to cooperate with the several States and the duly authorized officials thereof." See opinion of the district court, J.S. 13a.

commodate Section 202(b) with 203(a)(10), it is apparent that certificates granted to motor carriers by the Interstate Commerce Commission can authorize only bona fide interstate transportations. They cannot be used to license devices for engaging in intrastate commerce free of the regulation left to State jurisdiction by the Act. This Court held in *Service Transfer Co., supra,* that it was the Commission's function to enforce this limitation and that the States should pursue their federal remedy before the Commission (359 U.S. at 179).

4. Shortly before the New Jersey district court rendered its opinion in the instant case, a three-judge district court in Pennsylvania decided *Jones Motor Co., Inc.* v. *United States and Interstate Commerce Commission,* 218 F. Supp. 133 (E.D., Pa., June 4, 1963). The *Jones* case also involved a certificated interstate motor carrier which was transporting through New Jersey shipments originating at a point in Pennsylvania and destined to other points in Pennsylvania. The matter came before the Commission, on complaint of the State of Pennsylvania filed under the provisions of Section 204(c) of the Interstate Commerce Act (49 U.S.C. 304(c)). The Commission found that Jones' operations were not bona fide operations in interstate commerce and it entered a cease and desist order against Jones.

The majority of the reviewing court in the *Jones* case (Circuit Judge Ganey dissenting) disagreed with the Commission and found (218 F. Supp. at 138),

after passing on the evidence, that Jones was not abusing its interstate certificate. The government and intervening defendants in the *Jones* case petitioned for rehearing. The matter was reargued before the district court. On November 21, 1963, the district court issued its opinion and order on rehearing, in which the majority reaffirmed its prior decision.* We are informed that the State of Pennsylvania intends to take an appeal from the decision in *Jones*.

Whatever may be the merits of the district court's decision in the *Jones* case, it is clear that there is no conflict between that case and the instant one on the question of the Commission's power to issue cease and desist orders prohibiting the tacking of federal operating authorities as a subterfuge to avoid State regulation of intrastate commerce. The issue in *Jones* was whether the facts there supported the Commission's finding of subterfuge. On rehearing, the *Jones* court emphasized that its reversal of the Commission was based upon its evaluation of the evidence (App., *infra*, pp. 11–12). The district court in the instant case properly distinguished *Jones* on its facts (J.S. 12a–13a, fn. 1). There is, therefore, no occasion for the Court to delay the disposition of this appeal pending the appeal in *Jones*.

---

* Since the opinion and order on rehearing in *Jones* has not yet been reported, we reproduce it in the Appendix, *infra*, pp. 11–14.

CONCLUSION

This appeal presents no substantial question warranting plenary consideration and the judgment of the district court should be affirmed.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

WILLIAM H. ORRICK, JR.,
Assistant Attorney General.

LIONEL KESTENBAUM,
GERALD KADISH,
Attorneys.

ROBERT W. GINNANE,
General Counsel,

H. NEIL GARSON,
Associate General Counsel,
Interstate Commerce Commission.

DECEMBER 1963.

APPENDIX

In the United States District Court for the Eastern District of Pennsylvania

Civil Action No. 32629, Filed Nov. 21, 1963

JONES MOTOR CO., INC.

v.

THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION

OPINION AND ORDER ON REHEARING

Before: J. CULLEN GANEY, *Circuit Judge,* and HAROLD K. WOOD and JOSEPH S. LORD, III, *District Judges*
By: WOOD, *District Judge*

On June 4, 1963, we reversed the Order of the Interstate Commerce Commission which had found the plaintiff motor carrier guilty of a subterfuge to avoid the jurisdiction of the Commonwealth of Pennsylvania.

Thereafter, we granted the defendants' petitions for rehearing and reconsideration on July 23, 1963. This rehearing was held on October 11, 1963.

The basis of our prior opinion and order was that the record failed to disclose substantial evidence to support the Commission's finding of subterfuge on the part of Jones.

When Jones carries shipments from states other than Pennsylvania to Allentown it must use its certificated route through Philadelphia and Clinton, New Jersey, to Allentown. It can use none other because

this is the only authority it has from the Interstate Commerce Commission. This route is 96.2 miles long and the driving time is 3 hours, whereas the route from Philadelphia to Allentown via Route 309 is 55 miles and requires 2 hours and 5 minutes driving time. The only remaining route wholly within Pennsylvania is the Pennsylvania Turnpike, the distance being 74.9 miles and the driving time is 1 hour and 50 minutes.[1]

It seems to be logical and normal for Jones to carry the comparatively few Philadelphia to Allentown shipments, shown on the record,[2] on its 96 mile trip rather than to delay these few shipments for several days until a larger quantity could be dispatched over a route wholly within Pennsylvania.

Were Jones to split its operation to carry the questioned traffic on one truck via Route 309[3] which is 55 miles long and the remaining shipments over its 96 mile interstate route it would result in a combined total of 151 truck miles. This hardly seems practical and efficient from the standpoint of operating economy when one truck traveling 96 truck miles could carry all the shipments in one movement. Any increased fuel expense incurred by Jones in utilizing its interstate route would be offset by a saving in fewer drivers and trucks.

Since these 22 shipments are by definition "interstate"[4] and further, since 96 truck miles are preferable to 151 truck miles, we find no evidence of bad faith in the record of this proceeding.

---

[1] In *Service Transfer Co.* v. *Virginia*, 359 U.S. 171, 175 (1959), the circuitous routes utilized by the carrier were sometimes *twice* the shortest possible intrastate route. The driving times are not mentioned and apparently were not important.

[2] 22 in number.

[3] Assuming that Jones had Pennsylvania authority.

[4] *Service Transfer Co.* v. *Virginia*, *supra*, Footnote 1.

For these reasons and those outlined in our prior Opinion, we dismiss the defendants' petitions for reconsideration.

ORDER

AND NOW, this 21st day of November, 1963, the defendants' petitions for reconsideration are dismissed and our Order of June 4, 1963 is affirmed.

[s] HAROLD K. WOOD, *J.*

[s] JOSEPH S. LORD, III, *J.*

J. CULLEN GANEY, *Circuit Judge,* dissenting.

I dissent.

The distance between Philadelphia and Allentown, on appellant's certificated route—its authority from the Interstate Commerce Commission—is 96.2 miles. The intrastate distance betwen Allentown and Philadelphia on Route 309, an excellent highway, is 55 miles, a saving of some 41 miles if the appellant had the approval of the Pennsylvania Public Utility Commission. It is indisputable that the run from Philadelphia to Trenton and back to Philadelphia is a dry run in that no stops were made en route to Trenton nor at Trenton itself nor from Trenton to Philadelphia. Accordingly, this differs radically from *Service Storage and Transfer Co.* v. *Virginia,* 359 U.S. 171, where Bluefield, West Virginia, which would correspond to Trenton in the instant case, was a terminal point on the certificated route, where the truck stopped, goods were delivered from it and other goods taken aboard, which gave reason and substance for going there, all absent in the instant case. Here, the truck may well have been taken to Clinton, New Jersey, or the New Jersey side of the Tacony-Palmyra Bridge, both on the appellant's certificated route, and a much shorter distance, turned around and gone on

to Allentown and there would have been as much substance to the trip as going many miles deeper into New Jersey to Trenton.

Conceding, as is obvious, that 49 U.S.C.A. § 303(10) defines "interstate commerce" as including "commerce * * * between places in the same State through another State * * *", it must likewise be conceded that this action must not be construed in a vacuum, but that inherent in the statute is the bona fides of the transaction or commerce and that merely a dry run traversing a portion of a certificated route without rhyme or reason cannot make the "commerce" interstate and thus enable it to avoid interstate regulation.

I can see no other reason for this bizarre performance other than as a subterfuge to avoid compliance with the Public Service Commission of Pennsylvania, and I reiterate the reasons set out in my original dissent.

J. CULLEN GANEY, *Circuit Judge.*

U.S. GOVERNMENT PRINTING OFFICE: 1951